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OMBUDSMAN FOR AMERICAN GOVERNMENT:
AN EXERCISE IN FUTILITY

By

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B.A., University of Montana, 1975

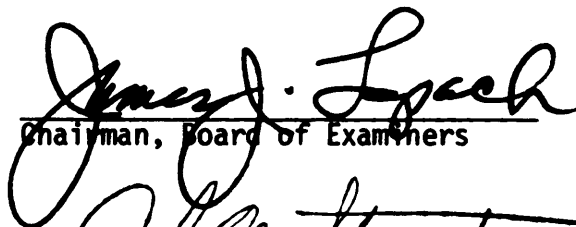
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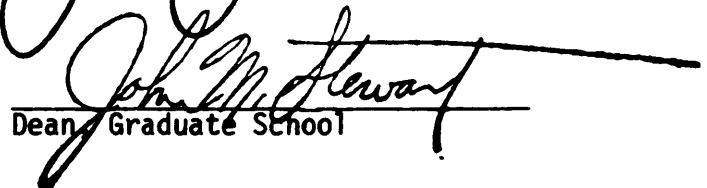
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INTRODUCTION

To complain of the age we live in, to murmur at the present possessors of power, to lament the past, to conceive extravagant hopes of the future, are the common dispositions of the greatest part of mankind Such complaints and humors have existed in all times; yet as all times have not been alike, true political sagacity manifests itself in distinguishing that complaint which only characterizes the general infirmity of human nature, from those which are symptoms of the particular distemperature of our own air and season.

Edmund Burke, "Thoughts on the Cause of the Present Discontents" in *The Writings and Speeches of Edmund Burke* (London: Bickers and Sons, Ltd., 1901), p. 437

Foreign success with a grievance-handling mechanism known as the ombudsman has prompted efforts to transfer it to the federal, state and local governments in the United States. Proponents of the institution have argued that since the Scandinavian model of the ombudsman concept has been the most effective complaint mechanism elsewhere, it would be only a matter of time before it would be widely adopted in this country. However, the operation and success of the classical ombudsman institution requires the existence of a particular political and administrative environment.

Because of this, many ombudsman scholars have questioned whether the political culture and administrative institutions in the United States are compatible with the overall goals and objectives of an ombudsman office patterned after the Scandinavian model.

This paper focuses on the characteristics associated with the classical ombudsman institution and discusses their general applicability to the American political system. Since attempts have been made to adopt the ombudsman institution at the federal level and actual experimentation with the office is taking place in some cities and states, the paper is organized to give an adequate description of these activities and their relative success. Finally, once an analysis of federal, state and local involvement with the ombudsman concept is presented, a case study of an American version of the classical ombudsman institution is presented.

CHAPTER I

OMBUDSMAN AT THE FEDERAL LEVEL?

In the concluding remarks of The New Public Personnel Administration, Felix and Lloyd Nigro offer the results of a Harris Poll as an indication of the magnitude of the public's disenchantment with government.¹ The Senate subcommittee that had solicited the Harris organization relayed the following message in their report:

While disenchantment among the public runs deep, it is important to point out that this disaffection is far more directed at the leadership of our institutions than at the institutions themselves. In other studies, we have found no more than 5 percent of the public are at all ready to scrap the major institutions that make up our voluntary, essentially privately oriented society. In this study itself, 9 in every 10 people, a high number, expressed the cardinal article of faith that government can be made to work efficiently and effectively, and within the parameters of liberty a free people require. But there is a mood of skepticism about current leadership of nearly all institutions, and just below the surface a growing willingness to throw the rascals out. The people want change, not to overthrow the system, but to make it work the way they think it should.²

In response to this (and many other similar reports), the National Academy of Public Administration established a panel to investigate and make recommendations to help curb what appeared to be a sharp deterioration in the quality of public personnel and the subsequent problem of the public's disillusionment and lack of confidence in the federal government as a whole. After months of deliberation,

the panel proposed measures that would insure greater control over the selection of political appointees and create a Federal Service Ethics Board to set guidelines for federal employees and investigate ethical questions brought before it.³ The most controversial reform proposed by the panel was that "an ombudsman for the entire government or one in each agency be appointed to consider complaints of ethical violations against federal officials."⁴ The purpose of this section is to analyze the feasibility of this recommendation given the political and administrative environment that exists at the federal level in the United States. However, prior to this, the origins and nature of the ombudsman concept will be discussed.

Origins and Characteristics of the Ombudsman Institution

The ombudsman idea originated in Sweden when the "J st tie-ombudsman (JO) was first appointed as an officer of the legislature under the Constitution of 1809."⁵ Essentially, the JO was supposed to be the legislature's own "defender of the law" concerned mainly with supervising the courts and the police; and his activities centered in this realm throughout the nineteenth century. Although the twentieth century saw the idea of the ombudsman spread to Finland, Poland, New Zealand, Guyana, Canada, Britain, Australia, Denmark, Norway, West Germany, the Philippines, Ireland, The Netherlands, and several cities and states within the United States, and the focus of

the office of the ombudsman expanded to include administrative as well as judicial activities, widespread acceptance, or "Ombudsmania" as one scholar called it, was the exception rather than the rule.⁶

Of the jurisdictions that did adopt and implement the ombudsman system, many agreed that the office did, in the performance of its complaint-handing function, enhance the relationship between government and the citizenry. Specifically, because agents of the government can be "incompetent instead of wise, ruthless instead of vigorous, disloyal instead of dedicated, and corrupt instead of upright,"⁷ there is a realistic need for someone to safeguard citizens against governmental abuse and help leaders detect and correct subordinates' shortcomings.

To ensure that the individual who is delegated to carry out the ombudsman function has the power to operate effectively, many countries, cities and states have issued them the power to:

1. prosecute bureaucrats and judges in cases of alleged criminal violations;
2. recommend alternative legislative and administrative measures;
3. investigate the activities of all government officials;
4. criticize any governmental activity;
5. make public his findings;
6. take up matters on his own initiative;
7. solicit complaints;
8. refer grievances to specific agencies or officials;
9. oversee fiscal activity and auditing procedures;
10. shield civil servants from unfounded accusations; and
11. dismiss complaints (after first explaining the reasons to the complainant).⁸

Again, the reader must be aware of the fact that not all of the ombudsman offices currently in existence enjoy the wide latitude of delegated powers depicted above. In some cases where the complaint-handling office is located in a particular department, branch, or bureau, the focus of the ombudsman is extremely narrow. In general, most governmental entities which have ombudsman offices agree that the office is there as a "watchdog" to ensure accountability of officials, procedural efficiency, fiscal integrity, responsiveness and fairness in administration; however, how all of these are accomplished is not a matter of consensus. Once the apparatus has been constructed and the necessary powers mandated, the ideal grievance-handling institution is supposed to be:

1. widely available;
2. highly visible;
3. client-centered;
4. independent;
5. expert within its sphere of competence; and
6. capable of developing general recommendations for the improvement of complaint-producing situations.⁹

An ombudsman office is, by virtue of its mission (impartial handling of citizen complaints), usually located in administrative limbo, i.e., inside the political system but outside the control of any parent agency or political faction. Also, the office, according to Donald C. Rowat in The Ombudsman, "should be created by the legislature and afforded the status and requisite independence needed for it to function properly."¹⁰ Statutory limits of jurisdiction

and term of office should also be defined in the enabling legislation which also serves to protect the office against internal and external harassment.

Many ombudsman scholars feel that the selection of a person to fill the post of ombudsman is a crucial phase of the system's implementation and, more importantly, of the subsequent success of an ombudsman office. Although agreement is evident with respect to the person's background (legal) and personal qualifications (the individual must have proven integrity, good judgment, courage, persuasiveness, enthusiasm, and energy), it is not clear whether this person should be selected from the citizenry or the government.

Basically, three fundamental characteristics of the Scandinavian ombudsman system are evident. These are:

1. The ombudsman is an independent and nonpartisan officer of the legislature, usually provided for in the constitution, who supervises the administration;
2. he deals with specific complaints from the public against administrative injustice and maladministration; and,
3. he has the power to investigate, criticize, and publicize, but not to reverse, administrative action.

It is also important to mention that the governments currently utilizing the services of an ombudsman office do not view it as a panacea for all of governments ills. Instead, the office is created to complement or supplement existing complaint-handling mechanisms and appeal procedures. It is precisely this emphasis that has created.

much of the support for an ombudsman office at the federal level in the U.S.; consequently, an analysis of existing federal appeal machinery is necessary.

Existing Grievance-handling Mechanisms
at the Federal Level in the U.S.

Channels for citizens' complaints have been part of individual agency operations at all levels of government for quite some time. However, as government activity expanded into the private sector after World War II, the United States did not follow the same path with respect to citizen protection against improper use of governmental power as other countries, because "we regulate what they nationalize."¹² Instead we developed a pervasive system of procedural safeguards and judicial review that appears superior to any other country in the world.

According to William B. Gwyn, the main avenues for citizens in the United States to redress grievances are:

The Courts--No one would deny that the courts of the United States are important avenues of complaint against administration and that through their decisions they improve administrative procedures. When a civil servant is believed to have acted without legal authority, to have failed to have carried out a duty defined precisely by law, or to have needlessly harmed someone's person or property, Americans turn to the courts for redress.

Grand Juries--The defects in the courts' performance of the reform function are to be found in their investigatory arm, the grand jury, a body of citizens empaneled both to bring formal charges against suspects in criminal cases and to uncover criminal activity within

the courts' jurisdictions. Equipped with a court's power to subpoena witnesses and papers, the grand jury is supposed to discover criminal activity and then bring charges against those engaged in it. In the case of public officers, even when there is no evidence upon which to base a criminal charge, the grand jury may nevertheless issue reports publicly criticizing persons and institutions.

Government Law Officers--Every state has an attorney general and district attorney who, among other activities, may receive complaints about alleged criminal conduct by public officials. When he inquired among attorneys general of the various states about where citizens were most likely to go with complaints against state administration agencies, Professor Richard I. Aaron was told that one frequent place was their own offices.

Chief Executives--This category includes the President of the United States, governors of states, and local chief executives. All are in a position to initiate investigations of administrative practices and to varying extents all do, sometimes with salutary effects, but administrative reform must compete with the many other problems with which chief executives are concerned. As heads of administration, all chief executives receive in the mail which floods into their offices complaints about administrative activity. Letters of complaint to the White House or the governor's mansion routinely are taken care of by administrative assistants, who simply send them on to the agencies concerned to prepare answers. In effect, without knowing it, the complainant usually is addressing his complaint to the very people he believes to have injured him. This also seems true of most localities although some have created specialized agencies for dealing more expertly with complaints.

Legislatures--Taken all together, the American legislative assembly, its committees, and its individual members are very important in reforming public administration and handling complaints about bureaucratic activity. As a law-making body, the legislature within limits set by the relevant constitution can create and eliminate administrative agencies and prescribe rules by which they should operate. At the state and local levels, the limits can be considerable. Through the activities of its committees, the legislature can oversee the actual conduct of administration, and through the "case work" of its members, it can handle a large number of individual complaints.

Legislators--To an apparently increasing degree, the 535 members of the Congress of the United States and the approximately 7700 state legislators individually perform among a number of other functions that of handling citizens' grievances against public administration. In several respects, the legislator's performance of this function resembles that of the Ombudsman: both provide quick service for the complainant at no trouble or expense to himself and both rely heavily for information upon the administrative agencies themselves.

Private Activity--Thus far we have been considering public institutions in America which handle individual complaints against public administration or take a part in improving bureaucracy generally. There are, in addition, private organizations which assist in the performance of these functions. Research institutes study possible reforms. Interest groups of various sorts will sometimes intercede for a member or client who believes himself wronged by the governmental bureaucracy. The American Civil Liberties Union and the National Association for the Advancement of Colored People are well known examples. Another kind of institution which has long played a part in improving governmental administration as well as voicing and investigating the complaints of individuals has been the American press, especially when the crusade has been likely to increase circulation.¹³

The list of grievance-handling institutions given above illustrates the formal and semi-formal appeal framework available to the American people. Informal methods, such as telephone calls to friends occupying powerful positions, bribes, etc. are important in remedying grievances, but they are not considered here because they would probably exist under any political authority or administrative process. Although it is possible to conclude, as did the panel from the National Academy of Public Administration, that despite the existence of these institutions, public distrust and disenchantment

with the federal government and its personnel has not changed and, in fact, has increased, it does not automatically follow that a federal ombudsman is the answer to all or any of our problems. Moreover, before the Scandinavian model is transferred, serious consideration should be given to its compatibility with the political and administrative machinery that exists at the federal level in the United States.

Can the Ombudsman be Transferred?

Advocates of the ombudsman system have attempted to adopt the idea, or forms of it, at the federal level since the middle of the 1960's. Three separate bills, one by Congressman Henry S. Reuss (D-Wisc.) in 1965, another by Senator V. Long (D-Missouri) in 1966, and a bill introduced by Jacob Javits in 1971, were all killed in their respective committees because it was felt that "casework is the proper function of the individual member of Congress and should not be delegated to an administrative body."¹⁴ Also, many examples of ombudsman-type offices have existed or are currently in operation; such as the now defunct Civil Rights Commission, the Loyalty Review Board, and the President's Listening Post or the existing offices of the Inspector General of the Army, Comptroller General and the Court of Claims.¹⁵

Several of the most often mentioned reasons for doubting that an ombudsman system can be implemented and successfully operated at the federal level include:

1. The tremendous size and population of this country would extremely hamper the efforts of one man or group of men (and their staff) to handle adequately citizens' complaints. To underscore the volume of grievances that might be expected, "the Executive Branch currently receives about 40,000 calls and letters a year that seek assistance in matters involving federal activities."¹⁶ Professor Gellhorn, in his book When Americans Complain, estimated that "well over 200,000 complaints about administration reach congressional offices in the course of a year."¹⁷ To handle such a massive caseload, Kenneth Culp Davis predicted that a staff from 2,000 to 4,000 people would be needed, and even then fair and equal treatment in the processing of citizens' grievances could not be guaranteed.¹⁸
2. In our federal system, overlapping jurisdictions are the rule rather than the exception, not to mention the cooperative ventures that federal, state, and local governments enter into as a matter of course. Consequently, a federal ombudsman investigating citizens' complaints

would be confronted on a continuing basis with grievances that involved more than one political or administrative jurisdiction. In order to remedy a complaint leveled against more than one level of government, an ombudsman would have to be endowed with considerable administrative and legal authority -- a phenomenon that does not, at least for the time being, appear likely, given the attitude already expressed by Congress toward the ombudsman concept.

3. The primary roadblock that stands in the way of the ombudsman idea at the federal level is the constitutional principle of separation of powers. Particularly, the creation of another isolated pocket of administrative authority would "cause a serious debilitation of the Presidency and . . . would aggravate the trend toward . . . diffusion of control."¹⁹
4. If the office of an ombudsman were created by Congress, the natural antagonism that exists between the Congress and the Executive would be intensified. It is also conceivable that, as a creature of Congress, the ombudsman could be used as a tool for partisan ends or, more importantly, be gradually delegated the responsibility of handling many or all of constituent grievances.

5. The relationship that would exist between the ombudsman office and the courts has yet to be defined. Some ombudsman scholars argue that because of the vague distinction between questions of administrative due process and problems of administrative policy in the United States, it would be easy for an ombudsman to overstep his bounds. Although proponents of this system state that his authority would extend to "discretionary decisions of administrators which courts typically are reluctant to touch,"²⁰ no pattern has yet been observed to distinguish what decisions they were referring to.
6. Another important consideration is the fact that no matter what branch of government created the office or where it is located, partisanship would always be a factor. It would be difficult for an ombudsman to transcend party strife especially when the office would owe its existence to one political faction or another.
7. In many cases "the effectiveness of the foreign ombudsman has hinged on highly significant intangibles, such as personality, image, or station."²¹ Although these qualities would be equally as important in our political

system, there is absolutely no guarantee that they would have any effect on the operation of an ombudsman office.

The preceding information has been designed to provide some indication of the chief deterrents to the implementation of the ombudsman system at the federal level in the United States. Although institutional obstacles have prevented the adoption of reforms of this type thus far, current trends toward expanded administrative safeguards and growing dissatisfaction with existing appeal machinery may combine to stimulate additional interest in less-structured, more informal and inexpensive grievance-handling mechanisms such as the ombudsman.

Conclusion

The United States does share common ties with those jurisdictions that utilize the services of an ombudsman for the simple reason that "sophisticated organizations that exercise power in industrial nations may not always act in the public interest."²² Specifically, "both professional and lay analysts of the administrative and political process...point to supposed inadequacies of our often exasperatingly vexatious, often duplicative, occasionally confused and confusing, and always maligned federal system of government."²³ Whether an ombudsman for the entire government or one in each agency would, in concert with existing appeal and grievance handling mechanisms, be able to effect positive changes in current operations, procedures,

and attitudes, remains to be seen. Until actual experimentation with the ombudsman institution occurs, there is no way to determine its compatibility with the political and administrative environment that currently exists at the federal level in the United States.

Footnotes

1. Felix and Lloyd Nigro, The New Public Personnel Administration (Itasca, IL: F.E. Peacock Publishers, 1976), p. 312.
2. Ibid., p. 313.
3. Ibid., pp. 324-325.
4. Ibid., p. 325.
5. Donald C. Rowat, "The Spread of the Ombudsman Idea" in Stanley V. Anderson (ed.), Ombudsman for American Government? (Englewood Cliffs, NJ: Prentice-Hall, Inc., 1968), p. 8.
6. Ibid., pp. 8-35.
7. Walter Gellhorn, Ombudsmen and Others (Cambridge, MA: Harvard University Press, 1969), p. 2.
8. Ibid., pp. 10-17, 75-80, 171-184, 205-208.
9. Roger C. Crampton, "A Federal Ombudsman," Duke Law Journal I (April, 1972): 1-14.
10. Donald C. Rowat (ed.), The Ombudsman (Toronto: Univ. of Toronto Press, 1968), pp. xii-xxiv.
11. Ibid., p. xxiv.
12. Kenneth Culp Davis, Administrative Law and Government (St. Paul, MN: West Publishing Co., 1975), p. 287.
13. William B. Gwyn, "Transferring the Ombudsman," in Stanley V. Anderson (ed.), Ombudsman for American Government? (Englewood Cliffs, NJ: Prentice-Hall, Inc., 1968), pp. 54-62.
14. Stanley V. Anderson, Ombudsman Papers: American Experience and Proposals (Berkeley: Institute of Governmental Studies, University of California, 1969), p. 16.
15. Samuel Kirslow, "A Restrained View," in Donald C. Rowat (ed.), The Ombudsman (Toronto: University of Toronto Press, 1965), p. 253.

16. Crampton, "A Federal Ombudsman," p. 6.
17. Walter Gellhorn, When Americans Complain, (Cambridge, Massachusetts: Harvard University Press, 1966), p. 93.
18. Davis, Administrative Law, p. 287.
19. Krislow, "A Restrained View," p. 251.
20. Gwyn, "Transferring the Ombudsman," pp. 63-68.
21. Ibid., pp. 61-69.
22. Gellhorn, Ombudsman and Others, p. 1.
23. Henry F. Abraham, "The Congressional System of Government",
in Donald C. Rowat (ed.), The Ombudsman (Toronto: University
of Toronto Press, 1965), p. 234.

CHAPTER II

STATE OMBUDSMANIA: A PLUS OR A MINUS ?

Since the early 1960's, politicians, scholars, students, administrators, and private citizens have been actively lobbying state officials in support of a grievance-handling mechanism modeled after the Scandinavian Ombudsman Office*. By the end of the 1960's, two major conferences** had been held specifically to discuss the possibility of transferring the ombudsman concept to the United States and it was concluded that: "We recommend the establishment of an ombudsman at the state level At this point, experimentation with the office is needed to provide useful guides for assuring acceptance, visibility, accessibility, and effectiveness."¹ Soon after the findings of the assemblies were publicized, state legislatures in Alaska, California, Colorado, Connecticut, Florida, Hawaii, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire,

*The major points of the Scandinavian model include: office of the legislature, not executive; politically independent; no power to quash or reverse a decision; can investigate on his own initiative; methods are direct, informal, speedy, and cheap.

**American Assembly of Columbia University, Harriman, New York, October, 1967; Western American Assembly on the Ombudsman, Berkely, California, June, 1968.

New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Washington, Wisconsin, and Puerto Rico² reacted by introducing enabling legislation that would open the door for complaint-handling mechanisms patterned after, but not restricted to, the Scandinavian model. However, despite this rather optimistic beginning, by 1973 only two states, Hawaii and Nebraska, had adopted legislation creating ombudsman-type offices.³ Although the limited response by the states is more than the experience at the federal level, where no formal experimentation with the ombudsman concept has occurred, implementation of the ombudsman office at the state level is still the exception rather than the rule. In the following pages, an analysis of the major reasons why the states have not adopted or have been hesitant to implement ombudsman offices will be discussed. Also, a case study of the Hawaiian experience will be provided to give an indication of the impact of an actual ombudsman office at the state level in the United States.

State Barriers

Many of the obstacles that have hindered or prevented the adoption of the ombudsman institution in the federal government are also evident at the state level. For instance:

1. The quantitative argument, i.e., the geographic and demographic size of the American states and their populations is still a major consideration at the state

level. For instance, the Governor's office in the State of California receives approximately 2,000 inquiries per day concerning state government activity.⁴

Just as at the federal level, an ombudsman, in order to handle a caseload of this magnitude, would require the assistance of a small bureaucracy. No guarantee of equal treatment in administrative processing of citizens' grievances would be possible.

2. The "built-in" antagonism between the executive, legislative and judicial branches, embodied in the principle of separation of powers at the federal level, is equally as important in state government. An ombudsman, empowered to cross political boundaries to investigate citizens' complaints may be viewed by state government officials as a potential threat to the institutionalized system of checks and balances.
3. Since the creation of an ombudsman office would entail either executive action or legislative ratification, partisanship would again be a factor. Party in-fighting and petty jealousies within and between members of the executive and legislative branches of government could hinder and possibly prevent an ombudsman from investigating and solving citizens' complaints. Party conflict could also

sabotage recommendations proposed by the ombudsman to increase the efficiency of the administrative process and overall government operations.

4. Perhaps the most frustrating problem the ombudsman would continuously be confronted with is embodied in the concept of "marble-cake"⁵ federalism. Just as at the federal level, extremely complex administrative problems involving several governmental jurisdictions would probably confront the ombudsman on a daily basis. Despite whatever good intentions an ombudsman may have to solve these problems, jurisdictional restrictions, combined with his limited authority to persuade rather than force agency action, undermine his ability to act in accordance with the seriousness of a complaint.
5. According to Walter Gellhorn in Ombudsman for American Government, approximately 70 percent of current complaints to legislators involve political questions and are totally out of the ombudsman's jurisdiction. This information points out one of the most negative features of the ombudsman concept--that ombudsman offices are on the whole forced, due to lack of jurisdiction, to reject a majority of the complaints they receive.⁶

There is no conclusive evidence that the formal grievance-handling mechanisms currently functioning at the state level are ineffective. The great majority of complaints concerning the operations of state government are sent to the Governor's office. This allows the staff and the Governor not only to remain aware of the volume, type, and scope of grievances against the incumbent's administration, but also gives them the opportunity to monitor the actions taken by specific agencies and, if necessary, apply additional pressure to expedite the processing of citizens' complaints. An ombudsman, on the other hand, given the broad and administratively weak grant of authority characteristic of the office, would be hard-pressed to secure agency compliance if it did not coincide with his recommendations.

Also included in the California study were statistics on the flow of mail received by randomly selected legislators. "Two of the legislators included in the study averaged fewer than four complaints a week, while one legislator is reported to get 100" ⁷ All of the legislators in the study felt that handling constituent complaints was a necessary part of their job, and only in rare circumstances, such as extremely controversial issues, were there more complaints than the average legislator could handle. ⁸

Opponents of the ombudsman institution argue, therefore, that the courts, grand juries, government law officers, the Governor's

office, legislators, legislative councils, interim legislative and executive committees, general legislative oversight, agency machinery for review or appeal and state provisions for the publication of administrative rules and regulations exist to aid the citizen who falls prey to governmental administration.⁹ In fact, one of the most outspoken proponents of the ombudsman system has admitted that:

... the formal [grievance-handling] machinery of the state appears to be equipped . . . to handle general problems of administrative organization, procedure, and efficiency, and it may still be argued that the particular problems of individuals can be resolved within the informal channels of redress provided by the Governor's office and the Legislature.¹⁰

The preceding analysis illustrates some of the major obstacles involved in the creation and implementation of an ombudsman office within the institutional framework of state government in the United States. Although the existence of these roadblocks has prevented many states from creating ombudsman offices patterned after the Scandinavian model, this has not held true in the case of Hawaii.

The Hawaiian Ombudsman Experience

Hawaii became the first state to endorse the concept of an ombudsman when its legislature passed the Hawaiian Ombudsman bill in 1967; however, the office did not begin taking citizen grievances until July 1, 1969.¹¹ Patterned after the Scandinavian model, the office represents what appears to be the first successful attempt

to transfer the ombudsman institution to state government in the United States. Its major objectives are:

1. redress of individual grievances;
2. prevent recurrence of similar complaints;
3. increase responsiveness of administrators;
4. protect government administrators from unfounded criticism;
5. identify and correct patterns of undesirable administrative practices or procedures;
6. education of the public about governmental operations and functions; and
7. relieve legislators of the complaint-handling burden.¹²

Operating on an annual budget of \$103,000 and staffed by from 6 to 9 persons, the office has processed an average of 1,300 grievances per year.¹³ The success of the office's operations thus far have been attributed to the personality of the current ombudsman, Herman Doi. Doi has maintained an honest and open-relationship with executive, legislative and administrative officials since the office was created. His impartial handling of citizens' complaints has virtually eliminated initial criticism that the ombudsman office would become the tool of the dominant political faction. As a result, bipartisan support for the office has increased to the point that the Hawaiian ombudsman office's future appears relatively secure.¹⁴ The nature of the office's activities is such that it supplements existing

complaint-handling institutions. Since the office's major goal is to expedite the processing of citizens' grievances, constant cooperation with all state government officials is necessary. Doi has not attempted to "steal the spotlight" from specific agencies in the resolution of complaints nor has he tried to pre-empt agency action by sidestepping the formal and informal administrative machinery.¹⁵ Also, citizen expectations of the office have largely coincided with its legal authority to remedy complaints. Public relations efforts, focusing on personal appearances by the ombudsman, have educated the public with respect to the office's capacity to solve citizens' grievances. Consequently, their caseload reflects a growing number of legitimate grievances that are within their jurisdiction.¹⁶ In addition, the Hawaiian ombudsman office has developed methods of operation that parallel those of the Scandinavian model, i.e., they are direct, informal, speedy and cheap. The total cost per capita for the establishment of the office has run approximately 13¢ while the cost per case is about \$100 and takes two weeks to process.¹⁷ These aspects are especially appealing to lower income persons who cannot afford the expense of litigation and to those whose complaint may not warrant the utilization of formal administrative or legal machinery.

Although many factors have contributed to the success of the Hawaiian ombudsman's office, such as the lack of strong political

party conflict, a high degree of administrative stability and a history of administrative, legislative and executive cooperation, the experiment is not without its problems. Because of the previous existence of as many as twelve complaint-handling institutions,¹⁸ duplication of services is a major concern. Many times complaints will be received by the ombudsman who, upon investigation, finds that the grievance has also been registered with another complaint-handling office. If this duplication goes unnoticed, administrative confusion has developed as the agency or agencies in question attempt to process and solve the complaint. Since cooperation is necessary if complaints are to be solved, an ombudsman must avoid conflict between administrative officials at all costs. For instance, one Hawaiian state government administrator flatly stated, "You start harassing me, and I'm not going to cooperate."¹⁹ To prevent a situation of this type from developing, on occasion the Hawaiian ombudsman has had to monitor passively the processing of a complaint rather than attempt to apply pressure and risk alienating the official involved. Since the Hawaiian ombudsman's powers are limited to those of persuasion and recommendation, the success of his office is dependent on the willingness of others to cooperate. Also, care must be taken not to publicize the uncooperative stance taken by any state government official because, again, it may undermine the future relationship between the ombudsman and the agency in question.

Perhaps the greatest problem the Hawaiian ombudsman has faced is the evaluation of the effectiveness of his office. To date, no poll has been taken to identify the contribution that the office is making both in the eyes of government officials and the citizens of Hawaii. The statistics that are available do not indicate such things as the average amount of time spent on each complaint, the nature of the complaints that are rejected or the success ratio of the office. Instead, the figures compiled simply indicate that of the 1,300 average yearly number of complaints received, only about 30 percent were considered valid.²⁰ This means that approximately 70 percent of the grievances reported to the office were rejected for lack of jurisdiction or were referred to a more appropriate agency for action. The jurisdictional problem, mentioned earlier as one of the primary theoretical roadblocks to the successful operation of the ombudsman office within a federal system, has thus proven to be a stumbling block in actual practice. This statement is corroborated by the Nebraska experience. There, only 40 percent of all grievances received were found to be within the ombudsman's jurisdiction and thus capable of being investigated.²¹ Even in Sweden, where the ombudsman office has been in operation for 168 years, the number of valid complaints received by the office averages approximately 15 percent.²²

Because of the paucity of empirical data, it is extremely difficult to determine whether the transfer of the foreign ombudsman office to Hawaii has been a success. However, the virtual lack of political opposition and citizen criticism are two indications that the office is performing its assigned functions rather well. Consequently, despite the jurisdictional problems that have plagued the operations of the office, it appears that its future as a legitimate state complaint-handling agency is relatively secure.

Conclusion

Although current experimentation at the state level with the ombudsman institution does not conclusively show that the office can be successfully grafted on to the state machinery, the Nebraska and especially the Hawaiian experience have provided convincing proof that the office can function rather effectively at the state level. However, since empirical evidence is not available, any predictions as to the possible contribution of an ombudsman office to state government operations would be speculation. To encourage experimentation with the ombudsman institution at the state level, and thus provide an expanded basis for empirical observation, federal money, through the Office of Economic Opportunity, has been made available.²³ This added stimulus should create additional interest in, and, in some cases, actual experimentation with the ombudsman institution and help remedy the informational deficit.

Footnotes

1. Stanley Scott (editor), Western American Assembly on the Ombudsman: Report (Berkeley, Institute of Governmental Studies, University of California, 1968), pp. 27 and 28.
2. Anderson, Stanley V., Ombudsman Papers: American Experience and Proposals, (Berkeley, Institute of Governmental Studies University of California, 1969, pp. 78-86.
3. Kent M. Weeks, Ombudsmen Around the World: A Comparative Chart (Berkeley, Institute of Governmental Studies, University of California, 1973), pp. 97-101.
4. John E. Moore, "State Government and the Ombudsman" in Ombudsman for American Government, Stanley V. Anderson (ed.), (Prentice-Hall Inc., Englewood Cliffs, NJ, 1968), p. 84.
5. Ibid. William B. Gwyn, "Transferring the Ombudsman", p. 63.
6. William B. Gwyn, "Transferring the Ombudsman" in Ombudsman for American Government, Stanley V. Anderson (ed.), (Prentice-Hall, Inc., Englewood Cliffs, NJ, 1968), pp. 91-95.
7. John E. Moore, p. 91.
8. Ibid., pp. 95-96.
9. Ibid., p. 77.
10. Ibid., p. 76.
11. Stanley V. Anderson and John E. Moore (editors), Establishing Ombudsman Offices: Recent Experience in the U.S. (Berkeley, Institute of Governmental Studies, Univ. of California, 1972), p. 27.
12. Ibid., p. 64.
13. Kent M. Weeks, Ombudsman Around the World: A Comparative Chart (Berkeley, Institute of Governmental Studies, Univ. of California, 1972), pp. 98-99.
14. Op cit., pp. 157-176.

15. Ibid., pp. 64-66, 69-70, 92-94.
16. Ibid., pp. 69-70.
17. Ibid., pp. 228-248.
18. When the Hawaiian ombudsman office was created it joined a host of related institutions, such as: public employee organizations, a Legal Aid Society, a Commission on Judicial Qualifications, an Office of Consumer Protection, a State Ethics Commission, an Office of the Legislative Auditor, the Honolulu Office of Information and Complaint, an Office of Information in the Governor's Office, an ombudsman for the University of Hawaii, penal institution-grievance mechanisms and departmental appeal machinery. Ibid., p. 54-59.
19. Ibid., p. 226.
20. Kent M. Weeks, pp. 98-99.
21. Alan I. Myner, The Nebraska Ombudsman: Innovation in State Government, (Berkeley: Institute of Governmental Studies, University of California, 1974), p. 126.
22. Kent M. Weeks, pp. 68-70.
23. U. S. Office of Economic Opportunity, Buffalo Citizen's Administrative Service: An Ombudsman Demonstration Project (Berkeley, Institute of Governmental Studies, University of California, 1970), p. 1.

CHAPTER III

LOCAL GOVERNMENT AND THE OMBUDSMAN

As one might expect, scholarly interest in transferring the ombudsman concept to American government did not stop at the federal and state levels. The same assembly that espoused the virtues of this form of grievance-handling mechanism at the state level also recommended the

widespread adoption of the ombudsman concept in local governments. [However] American local governments vary so greatly in size, population, legal structure, and vitality that we do not recommend a uniform design for the local ombudsman.¹

Ironically, the widespread interest and subsequent legislation that characterized the state's experience did not materialize to any measurable degree in city and county governments across the country; by 1973 the number of cities and counties taking advantage of ombudsman-type institutions could be counted on one hand.² The intent of this section is to discuss the extent of local acceptance and implementation of the ombudsman institution and, by focusing on a specific local jurisdiction utilizing the services of an ombudsman, give an indication of the nature of the office's activities and any problems it has experienced.

The Setting for a Local Ombudsman

One rationale for a federal system of government recognizes the right of citizens to create and maintain the "amount" of government they deem necessary at each level to accomplish socially desired goals. Thousands of incorporated political entities exist to perform uniquely local functions, while the federal and state governments scale their activities to provide for regional and national needs. The ability to mould a political jurisdiction to fit problems endemic to a particular area is by far the most important and without a doubt the most desirable phenomenon associated with local governments in this country.

Because of the proximity of local governments to the people they serve, the relationships between local officials and the local citizenry are still, in many areas of the country, based on personal association. Much more so than at any other level of government in the United States, local officials are immediately associated with the action or inaction of government and the success or failure of local programs. Every day public services such as

garbage collection, road maintenance, street lighting, traffic control, welfare administration, police security, fire fighting, planning and zoning, public utilities, public transportation, and a host of mundane but essentially community functions, strike home to everyone.³

The creation and operation of an ombudsman office must be viewed in relation to the problems currently facing local governments. Recent local concerns have also included major problems such as urban decay, environmental degradation, rising crime rates, dwindling tax bases and rising unemployment. With limited financial resources available and so many pressing problems confronting local officials, it is not difficult to discern why limited experimentation with the ombudsman institution has occurred at the local level in the United States. In order to stimulate local experimentation with the ombudsman institution, federal funding through the Office of Economic Opportunity was made available for pilot projects designed to test the transferability of the ombudsman institution to an urban center. The following is a discussion of one such project.

The Buffalo Ombudsman Demonstration Project

In the late summer of 1967, the Law School of the State University of New York at Buffalo received funds from the U.S. Office of Economic Opportunity to sponsor an Ombudsman Demonstration Project. Since virtually no empirical information existed concerning the possibility of transferring the ombudsman institution to an American urban center, this project was designed to help fill this

void. Rather than attempt an explanation of the entire Buffalo experience as it unfolded during the 16 months of its existence, this analysis will focus on those aspects of the demonstration project that, when considered as a whole, will give a sufficient indication of the office's characteristics and role at the local level.

The Role of Buffalo's City Officials

It is extremely important to note that local officials did not, nor did the citizens they represent, lobby for or initiate the Ombudsman Demonstration Project. Instead, the Citizens' Administrative Service was spawned and for the most part run by people from the academic community.⁴ The only real exceptions were the people representing the neighborhood communities, of which there were five.

Since the entire project was funded by the Office of Economic Opportunity, local officials could hardly turn it down. Tight budgets are the rule rather than the exception at the local level; consequently, one of the major obstacles to the creation of an ombudsman office is the lack of funding. In this case, local officials had the opportunity to expand their operations into a relatively innocuous area with no cost attached.

The creation of the office also provided local officials with an opportunity to expand their existing grievance-handling capacity.

Neighborhood offices were created in minority and low income sections of the city and persons indigenous to the neighborhoods were recruited to work in the offices. This emphasis is reflected in the statistics compiled on the Administrative Services' clientele:

66 percent of the complaints were black, 25 percent were white, 8 percent were Puerto Rican and 1 percent were Indian. Also, with respect to income levels, the calculations were necessarily rough, but it is estimated that complainants with incomes of less than \$3000 comprised 26 percent; those with \$3000-\$5000 comprised 33 percent; and those with \$5000-\$7000 comprised 30 percent of the caseload. The remainder had incomes over \$7000.⁵

Characteristics of the Citizens' Administrative Service

Because the Project was handled by outside personnel, local officials did not participate in the advertising, screening and selection of the ombudsman. In fact, the Project was designed to operate without an officially designated ombudsman and instead utilized the services of law students and persons indigenous to specific areas of the Buffalo community. During some periods, as many as 15 people were directly involved in the processing of citizens grievances that, when the project ended after 71 weeks of operation, eventually totaled 1,224.⁶ The areas receiving the largest number of complaints and inquiries were:

social service 153, public housing 119, building demolition 109, public health 103, street paving 54, police-traffic 55, police-nontraffic 44, and garbage removal 46.⁷

Statistics were also available that indicated that of the 1,224 complaints docketed, 143 were rejected for lack of jurisdiction, 17 were dismissed because they originated outside the Buffalo city limits, and 10 were withdrawn by complainants before action could be taken.⁸ Again, as in the case of Hawaii, the information did not include an analysis of the 1,054 cases handled to determine whether they had been solved or not.

The operating budget of the Citizens' Administrative Service during its 16 months of existence was \$123,182.⁹ This is more than the ombudsman for the State of Hawaii receives, even though he serves twice the population.¹⁰ The point here is that, given the previously mentioned problems currently facing many urban centers, it would be extremely difficult for local officials to allocate additional money or cut pre-existing programs to make room for an ombudsman office. A perfect example of this phenomenon is the City of Buffalo. After almost a year and a half of operations under a federal grant, the Citizens' Administrative Service failed to convince the Buffalo City Council that the benefits gained from the office exceeded the costs. Consequently, when the grant expired on March 31, 1969, local funding was not made available and the office went out of existence.¹¹

The Buffalo Demonstration Project, because it "has been the only office to date in an American industrial city functioning

as an Ombudsman independent of city and county administrations,"¹² did provide additional information concerning the feasibility of adapting the concept of an ombudsman to urban centers in the United States. However, certain practices employed by the projects' coordinators that resulted in extensive deviation from the Scandinavian model of the ombudsman institution have combined to undermine the projects' final recommendations.¹³ For instance:

1. The need for an additional grievance-handling mechanism was never established. The Project coordinators simply assumed that the Citizens' Administrative Service would supplement existing appeal machinery and substantiate its existence by contributing to the resolution of citizens' complaints. In the end, when sufficient evidence was not presented to substantiate the office's contribution, local funding was not made available. (For another example of this situation, read Barriers to Establishing Urban Ombudsman: The Case of Newark, by William B. Gwyn.)
2. An actual ombudsman was never appointed. Instead, students or neighborhood aides were utilized to process complaints. Aside from establishing the need for an ombudsman institution, the selection of the person to fill the position is perhaps the most controversial

stage in the implementation of an ombudsman office. Since local input into the selection of the office personnel was restricted to supplying neighborhood aides, virtually no experience was gained in this area.

3. Because of the methods employed by the project directors, it is not clear how the budget of an ombudsman office should be determined or at what level the office should be funded. Excessive outside funding in the beginning may create, as in the Buffalo experience, a small bureaucracy too large for the local government involved to fund once the grant has expired. Much more could have been gained if the project had operated on a much smaller budget--one that would not have made local officials balk at providing local money. As it is, the fact that the Buffalo City Council did not elect to continue the project may have contributed to the hesitancy of other local governments considering adopting ombudsman-type offices.
4. The use of students instead of professional personnel was advantageous to the project directors given the fact that their ultimate purpose was to "test the operation of the ombudsman in a typical American urban setting."¹⁴ Consequently, emphasis was placed on statistical

considerations such as the volume, type and location of complaints, and the social and economic characteristics of the complainants rather than on the professional handling and resolution of grievances.¹⁵ Unfortunately, with this approach there is no way to determine if a highly respected, professional, council-appointed ombudsman would have had similar results.

5. The virtual lack of governmental participation in all phases of the Citizens' Administrative Services creation and operation is an extensive deviation from the Scandinavian experience. As a result of the seminar approach taken by the Project directors, no more information was made available concerning the problems associated with the adoption and selection of an ombudsman at the local level than was previously known.

Drawbacks of the Buffalo Demonstration Project

Local governments do not all conform to the same political and administrative structure and organization. Consequently, whatever information that was gained as a result of the experimental ombudsman project, because it was conducted within the jurisdiction of a "strong" mayor-council form of government, would not necessarily hold true if a similar experiment were to occur under a city-manager, county commissioner or "weak" mayor form of government.

The Citizens' Administrative Service also functioned completely independent of local control. Although independence is a necessary requirement of an ombudsman institution patterned after the Scandinavian model, this does not mean that the office is totally disassociated from local government officials and operations. The office in the model exists as an independent entity within the local political and administrative apparatus. Because of this peculiar Buffalo circumstance, no information was gained as to what the relationship of an ombudsman would be to local officials in an actual administrative situation, i.e., where complaints are investigated by a council-appointed official.

Care should also have been taken by the projects' coordinators to indicate the success/failure ratio of those cases actually investigated. One of the most often mentioned drawbacks to the implementation of the ombudsman institution is the lack of data concerning the success of the office's grievance-handling function. If emphasis would have been placed on this aspect, the information obtained from the study may have had a greater impact on local governments considering the creation of ombudsman offices.

Conclusion

The problem of limited empirical data evident at both the state and federal level is also a major concern at the local level. Although the Buffalo Project was designed to help fill this gap,

its contribution, because of the circumstances stated above, has not been as substantial as its coordinators intended. As a result, the compatibility of the ombudsman institution to local government remains questionable. Until further evidence proves to the contrary, jurisdictional conflicts, caused by our federal system and the principle of separation of powers, are still the most pressing problems confronting existing local ombudsman offices. These obstacles, combined with traditional attitudes of legislators and executives toward constituent casework, must be overcome before widespread implementation of the ombudsman institution will occur at the local level in the United States.

General Summary: The Ombudsman and American Government

The decade-long debate concerning the compatibility of the Scandinavian model of the ombudsman concept with the American political system has been beset by normative and empirical problems. Much of the literature

has frequently consisted of superficial, formal descriptions of the office, similar to previously published descriptions and accompanied by little theoretical analysis of empirical research. The function served by such writing has been that of disseminating the idea of the ombudsman throughout the world,...and has done little to advance our understanding of the ombudsman institution and of the circumstances in this country relevant to its adoption.¹⁶

However, despite these problems, several ombudsman scholars (Gwyn, Gellhorn, Rowat, Moore) have been able to reach a consensus as to what may be the most desirable and undesirable aspects of an ombudsman institution in American government:

Desirable Consequences

1. The introduction of an ombudsman office at any level of government, whether by executive order or legislative mandate, requires a minimum of organizational and no structural alteration.¹⁷
2. In most cases, public administrators do more than they would do in the absence of an ombudsman.... Improvement stems partly from the ombudsman's recommendations and partly from his mere existence, which prompts administrators to take more care.¹⁸
3. The legislature is better prepared to oversee and improve administrative procedures and practices. This is the result of the ombudsman's annual report which brings before the legislature administrative shortcomings which would otherwise not come to its attention.¹⁹
4. Civil servants are protected from unfounded accusations.²⁰
5. When individual or group grievances are redressed, a positive contribution is made toward improving the citizen's relationship with government.²¹

Undesirable Consequences: The "Hidden costs" of the Ombudsman Concept

1. The timidity of civil servants is increased...i.e., awareness that someone is constantly looking over their shoulders causes some public officials to become too timid instead of too bold.²²

2. The ombudsman's activities can lead to the creation of unnecessary red tape. In a few instances, adoration of the written word occupies so large a portion of the working day [of some officials] that accomplishments worth writing about become fewer and fewer... ²³
3. Occasionally ombudsmen do more than they are suited to accomplish and attempt to influence decisions best left to administrators who are experts in handling certain matters. ²⁴
4. Since the ombudsman is not himself engaged in administrative activity, administrators and legislatures are inclined to treat his general proposals for reform as impractical. ²⁵
5. The citizens of a country with an ombudsman may become complacent about governmental problems. Too many persons seem willing to suppose, on much too little evidence, that God's in his heaven, all's right with the world of public administration as long as somebody like an ombudsman is keeping an eye on operations. ²⁶

In addition to these positive and negative characteristics, there is also agreement among many ombudsman scholars with respect to the environmental requisites that should be present before an ombudsman institution can be created and before it can function effectively.

These are:

1. there must be a bureaucracy to be complained about;
2. a law-making institution independent of and able to regulate the bureaucracy is a mandatory prerequisite;
3. general agreement as to standards of fair and efficient administration, accepted not only by the ombudsman, but also by bureaucrats, legislators and the rest of society;
4. some degree of administrative stability;
5. some degree of political harmony, i.e., a willingness on the part of the politicians and political factions to respect the neutral position and impartiality of the office. ²⁷

Although the problem of size, both geographically and demographically, is of considerable concern at the federal level, and relatively important in our larger states, it does not constitute a formidable barrier to the operation of an ombudsman office at the local level. However, it is fairly certain that the major obstacles, our federal system and concept of separation of powers, will continue to prevent or hamper efforts to adopt and operate ombudsman offices at every level of government in the United States. The current attitudes of members of legislative bodies that "casework is the proper function of the individual...and should not be delegated to an administrative body," also will hamper the passage of reforms patterned after the Scandinavian model. And, given the presently functioning formal and semi-formal appeal machinery at all levels of government, the claims of duplication of services will have to be addressed and sufficiently quieted before widespread public and private support of the ombudsman institution will be forthcoming.

The arguments surrounding the transfer of the ombudsman system to the United States have focused almost exclusively on the question of its compatibility with our political system and principles. Virtually no disagreement is evident, even among the most ardent opponents of the ombudsman concept, with respect to the desirability of having an effective grievance-handling facility that is direct,

informal, speedy and cheap. Some local and state government officials, unable to follow the requirements of the Scandinavian model, but convinced of the need for an ombudsman-type office in government, have sidestepped the problem of legislative ratification by looking to the executive branch for action. To expedite the creation of complaint-handling offices similar to the ombudsman institution, many political executives at the state and local levels have been called upon to exercise their power to expand unilaterally the executive branch. In the following pages, an example and discussion of an executive ombudsman office will be presented and a comparison will be drawn between it and an ombudsman office patterned after the Scandinavian model.

Footnotes

1. Stanley Scott (editor) Western American Assembly on the Ombudsman: Report (Berkeley, Institute of Governmental Studies, Univ. of California, September, 1968), p. 28.
2. Alan J. Wyner (editor) Executive Ombudsman in the U.S. (Berkeley, Institute of Governmental Studies, Univ. of California, 1973), p. v.
3. William H. Angus and Milton Kaplan, "The Ombudsman and Local Government" in Ombudsman for American Government, Stanley V. Anderson (ed.), (Prentice-Hall, Inc., Englewood Cliffs, NJ, 1968), p. 102.
4. U.S. Office of Economic Opportunity, Buffalo Citizens Administrative Service: An Ombudsman Demonstration Project (Berkeley, Institute of Governmental Studies, Univ. of California, 1970), pp. 16-17.
5. Ibid., p. 1.
6. Ibid., p. 1.
7. Ibid., p. 1.
8. Ibid., p. 62.
9. Ibid., p. 1.
10. Kent M. Weeks, Ombudsman Around the World: A Comparative Chart (Berkeley, Institute of Governmental Studies, Univ. of California, 1973), pp. 97-99.
11. Op cit., p. 4.
12. Ibid., p. 3.
13. The final recommendations were:
 1. By and large an American Ombudsman can and should use the Scandinavian Ombudsman as his model.
 2. He or some member of his staff should have had legal training.

3. A fairly concentrated population of 250,000 probably will, and one as small as 10,000 may, justify the establishment of a municipal Ombudsman's office, particularly if more than one local government is involved.
4. His function is better discharged by a separate office or an information bureau.
5. Except for the purpose of gaining experience, an Ombudsman's office should not function as an information or complaint-routing office. Those functions can be more economically performed by a separate central office within the municipality of other government.
6. Whenever requested, the Ombudsman should cooperate with legislators in investigating and disposing of the complaints they receive regarding administrative matters.
7. In recognition of the fact that conditions giving rise to complaints against local government more often exist in the poorer neighborhoods, the Ombudsman should have aids indigenous to those neighborhoods (with or without setting up neighborhood offices to which they can be assigned). This procedure is particularly desirable if racial or other tensions exist.
8. While police departments and public hospitals present special problems which should be recognized, no good reason appears for excluding them from the administrative agencies with which the Ombudsman deals.
9. Law students are potentially good office aides, but some time is required to give them the experience they need to develop into first-rate assistants.
10. While the existence and availability of the Ombudsman should be widely advertised, care must be taken not to exaggerate his powers or hide his limitations.
11. The local Ombudsman is more effective if his activities are not confined to the local governments but allowed to extend to the local offices of the state and national governments.
12. Finally, although we obviously cannot prove it, our experience leads us to believe that over a period of years an Ombudsman's office, properly run, will gradually gain prestige, will be consulted more often, and will find itself entrusted with increasingly important matters. Ibid., pp. 56-58.

14. Ibid., p. xi.
15. Stanley V. Anderson, "Proposals and Politics," in Ombudsman for American Government, Stanley V. Anderson (ed.), pp. 113, 148-149.
16. Ibid., p. 37.
17. Ibid., pp. 40-42.
18. Ibid., p. 41.
19. Ibid., p. 41.
20. Ibid., p. 42.
21. Ibid., pp. 40-42.
22. Walter Gellhorn, When Americans Complain, (Harvard University Press, Cambridge, MA), 1966, p. 52.
23. Op Cit., p. 432.
24. Ibid., p. 44.
25. Ibid., p. 44.
26. Ibid., pp. 44-45.
27. Ibid., pp. 45-49.

CHAPTER IV
EXECUTIVE OMBUDSMAN IN MONTANA:
THE CITIZENS' ADVOCATE OFFICE

On July 1, 1973,¹ Governor Thomas L. Judge formally announced the creation of a Citizens' Advocate Office for the purpose of "making state government more responsive and sensitive to the needs of Montana citizens." Although initial funding for the office was provided by the Governor's Office, after its first year of operation the Citizens' Advocate Office applied for and received a separate allocation from the legislature. The current 1977-79 budget of the Montana Citizens' Advocate Office is \$52,500 and it is staffed by the present citizens' advocate, Ms. Kathy McGowan and one full-time administrative aide. Before dealing with the specifics of the Montana experience, an analysis of the basic differences between the executive ombudsman and the Scandinavian Model will be presented as well as an indication of the similarities between the two.

Scandinavian Model vs. Executive Ombudsman

According to Stanley V. Anderson, a leading American scholar on the ombudsman institution, there are more similarities than differences between the classical ombudsman model and the American

version i.e., the executive ombudsman. In the conclusion of Executive Ombudsman in the United States, Anderson points out that:

The executive Ombudsman differs from his classical cousin in that the former is dependent upon the chief executive and serves at his pleasure, while a classical Ombudsman, once appointed [by a legislative body], serves for a fixed term at least formally independent of the appointing agency.²

Although not mentioned in Professor Anderson's article, relying on the executive as a source of authority may also create a difference in the qualifications required of the person to fill the post of executive ombudsman. The personal attributes such as honesty, integrity, knowledge of governmental operations and diplomatic ability may be important in the selection of an ombudsman under both models. In the case of an executive ombudsman, however, party affiliation may be as important, if not more important, than the personal qualifications mentioned above. Whether party designation has any effect on the functioning of an executive ombudsman office will be discussed later in relation to the Montana experience.

The characteristics most often associated with the classical ombudsman institution are: direct, informal, speedy, cheap, highly visible, highly accessible, independent, client-centered, expert within its sphere of competence and capable of developing general recommendations for the improvement of complaint-producing situations.³

An executive ombudsman institution encompasses all of these characteristics with the exception of "independence." Opponents of the executive ombudsman concept argue that the office's close ties with the Governor's office and executive branch, particularly the political affiliation, combine to undermine, if not destroy, its independent status. However, according to Anderson:

...executive Ombudsman and their classical counterparts are more alike in independence and impartiality than one might assume. For instance, the classical Ombudsman must depend upon his legislative creator for budgetary support just as the executive Ombudsman must depend upon the chief executive. Also, both types of Ombudsmen, as a matter of practice, are sensitive to the political realities within their jurisdictions.

Paradoxically, the chief executive often imposes independence upon his executive Ombudsman....Usually, the chief executive wants complaints to be examined impartially. Moreover, in order to preserve the integrity and effectiveness of the office, he is even willing to forego intervention in some cases where he might otherwise prefer a judgment based on partisan considerations.⁴

In terms of approaches to complaint-producing and complaint-handling situations, the "executive ombudsman will tend to stimulate faster and better service, while classical ombudsman offices will tend to stimulate the articulation of fair procedures in government."⁵ Both offices will have an impact on the administrative operations of government as long as the source of authority maintains its support and the bureaucracy is willing to cooperate. Neither office has the capabilities, expertise or power to alter radically

the internal or external activity and functions of government. Both are usually created to complement existing appeal machinery and allow wider access to government, government officials and government information. For the most part,

...differences in mode of access and kind of expertise reflect the different emphases in the functions of classical and executive Ombudsmen. Executive Ombudsmen are result-oriented. They strive to expedite governmental action. They must be adept at cutting knots. Classical Ombudsmen are process-oriented. They strive to streamline governmental procedure. They must be adept at unravelling red tape.⁶

Montana and the Governor's Citizens' Advocate Office

In May of 1973, Governor Thomas L. Judge created a complaint-handling office within the Executive Branch of Montana State government. The "pilot" project was initiated to test the feasibility of establishing a formal appeal mechanism at the state level. During the initial phase of the office's operations, Kent Kleinkopf, the first Citizens' Advocate and his administrative assistant, Kathy McGowan, functioned under a mandate similar to that of an ombudsman office patterned after the Scandinavian model. Publicity was shunned and emphasis was placed on discovering the effect the new office would have on existing administrative machinery and procedures throughout the first two months of the office's existence.

By the end of June, the office had received only 33 inquiries about state government operations, of which only 13 were actual complaints against government personnel or procedures. The paucity of complaints can be directly traced to the low-key approach taken by the office at the request of the Governor and the fact that no toll-free number was made available. From May 1, 1973 to July 1, 1973, 72.7 percent of the total number of complaints docketed were received by mail, 15.2 percent ^{by} of telephone (90 percent of these calls were local), and 12.1 percent of the complaints were registered personally. Of the 13 grievances levied against state government, three dealt with unemployment compensation, four were in the area of workman's compensation, three mentioned taxation, two were against the motor vehicles division of the Department of Justice, and one person complained about the activities and facilities of the Department of Institutions. All of the 13 grievances were resolved by the Citizens' Advocate Office except one complaint against the Department of Revenue and the one against the Department of Institutions. Governor Judge, pleased with the initial performance of the office and the willingness of administrative officials to work with the Citizens' Advocate and his staff, formally proclaimed the creation of the Montana Citizens' Advocate Office on July 1, 1973.

The Montana Citizens' Advocate enjoys virtually the same powers (with the exception of the ability to prosecute bureaucrats and fiscal oversight) and has many of the same characteristics of a legislative ombudsman. The major deviation from the Scandinavian model is confined to the office's administrative status, i.e., its independence. According to Kathy McGowan, who was appointed to the Citizens' Advocate post in July of 1974, Governor Judge expects the office to function independently of the Governor's Office and only on rare occasions will she seek his help in resolving a complaint. This imposed independence coincides with Stanley V. Anderson's version of an executive ombudsman's office.

One of the most interesting aspects of the Montana Citizens' Advocate Office has been the introduction of the toll-free telephone number. As previously noted, only 33 complaints were received by the office during its first two months of informal operation. Over 75 percent of these inquiries came by mail or through personal notification. Once the office was formally created and limited toll-free service (12 hours per month) was installed in September of 1973, the number of inquiries received by the office increased almost 600 percent by the end of September (a 30 day period). The tremendous response can be almost totally attributed to the installation of the toll-free number: of the 192 inquiries during the month of September, 80 percent came by telephone, 10 percent by mail, 6 percent by personal visit and 4 percent were referred by the Governor's Office.

During July of 1975, after a 24 hour toll-free number was installed in the office, the number of inquiries by telephone was approximately 93 percent of the total received and has averaged between 91 percent and 95 percent since that time.

Perhaps the greatest advantage of having a full-time toll-free capability is that it allows the citizens of Montana, especially the poor, to utilize the service at their own convenience. The significance of the toll-free number is illustrated in a random sample of inquiries taken during July 1975 (considered a slow month) and January, 1976, when tax season increases the office's caseload. The following is a discussion and an analysis of this sample.

Geographic Distribution

An important characteristic associated with the Montana Citizens' Advocate Office is that its services are utilized by an excellent cross-section of Montana communities. Figure 1 illustrates the geographic location of all of the complaints received by the office during the month of July, 1975. As might be expected, the larger communities, such as Billings, Missoula, Great Falls, Bozeman and Helena, registered more complaints than smaller cities and towns across Montana. Virtually every geographic section of Montana is represented, thus attesting to the office's overall accessibility. To substantiate this claim, another geographic sample was taken

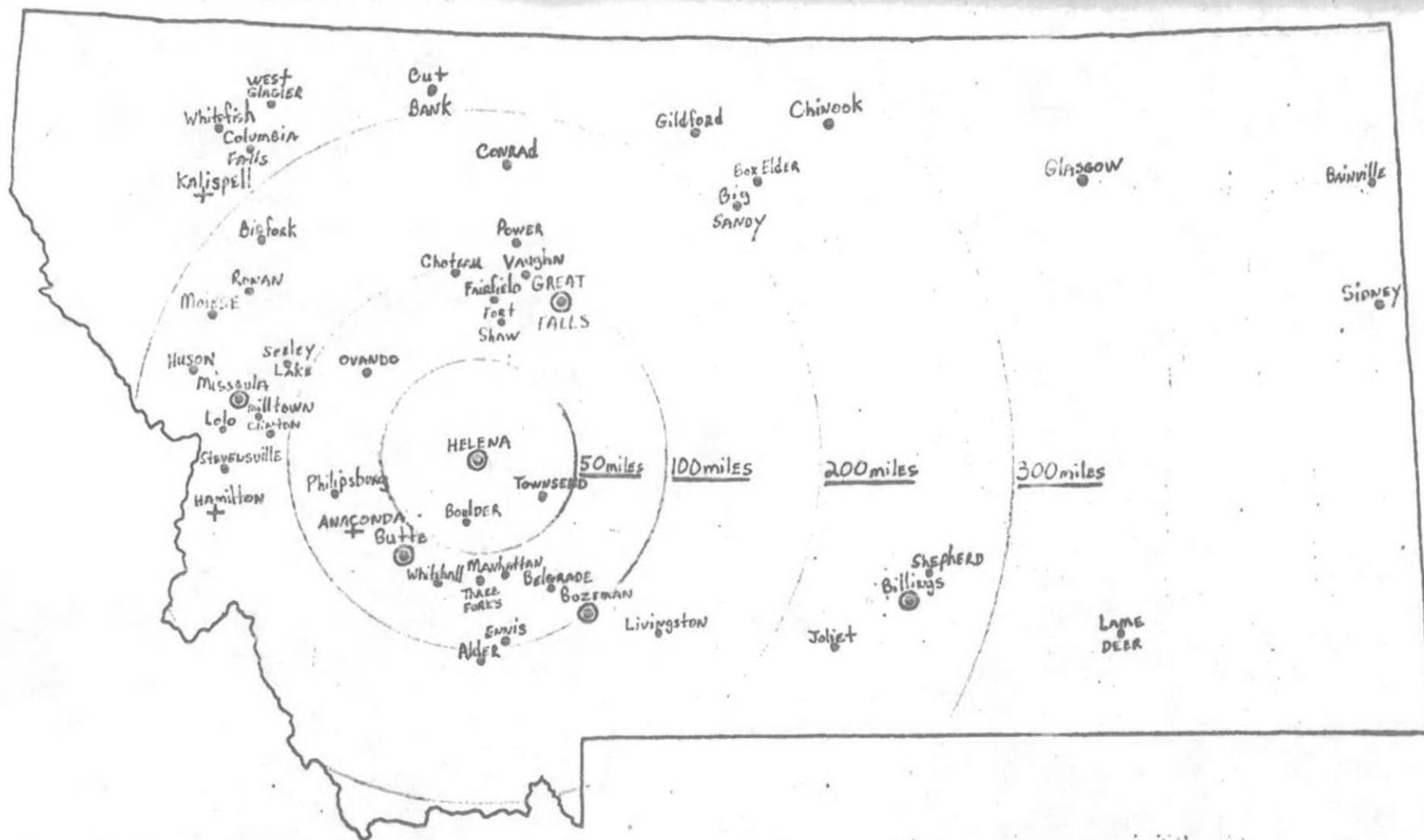
during the month of January, 1976. Figure 2 shows that there is still widespread utilization of the services offered by the Citizens' Advocate Office.

Jurisdictional Considerations

Both the Buffalo and the Hawaiian ombudsman offices were hampered by jurisdictional problems in the day-to-day resolution of citizens' grievances. The Montana Citizens' Advocate Office, however, has not experienced this dilemma. According to Stanley V. Anderson, this is largely due to the fact that:

Basically, an executive Ombudsman needs only to publicize the fact that he is there and wants to help. Classical Ombudsman must include in their advertisements an explanation of the statutorily defined scope. To an executive Ombudsman, a case is anything a citizen wants: information, service, a complaint or simply attention. To an Ombudsman in the classical mold, a case often relates to the manner in which government provides its services.⁷

The preceding quotation aptly describes the Montana executive ombudsman experience. When asked about the jurisdictional limitations of her office, Kathy McGowan responded that "even if a complaint deals with a federal, county or local agency or government, an attempt is made to put the complainant in touch with the entity most able to satisfy his needs." Also, since the office has no statutory jurisdictional limitation, over 98 percent of the approximately 55,000 complaints and inquiries received per year are able to be processed by her office. Examples of complaints or inquiries that



- 10 or more inquiries
- + 5 to 9 inquiries
- 1 to 4 inquiries

Figure 1. Geographic Distribution of Inquiries by Locality
July 1, 1975 to July 31, 1975

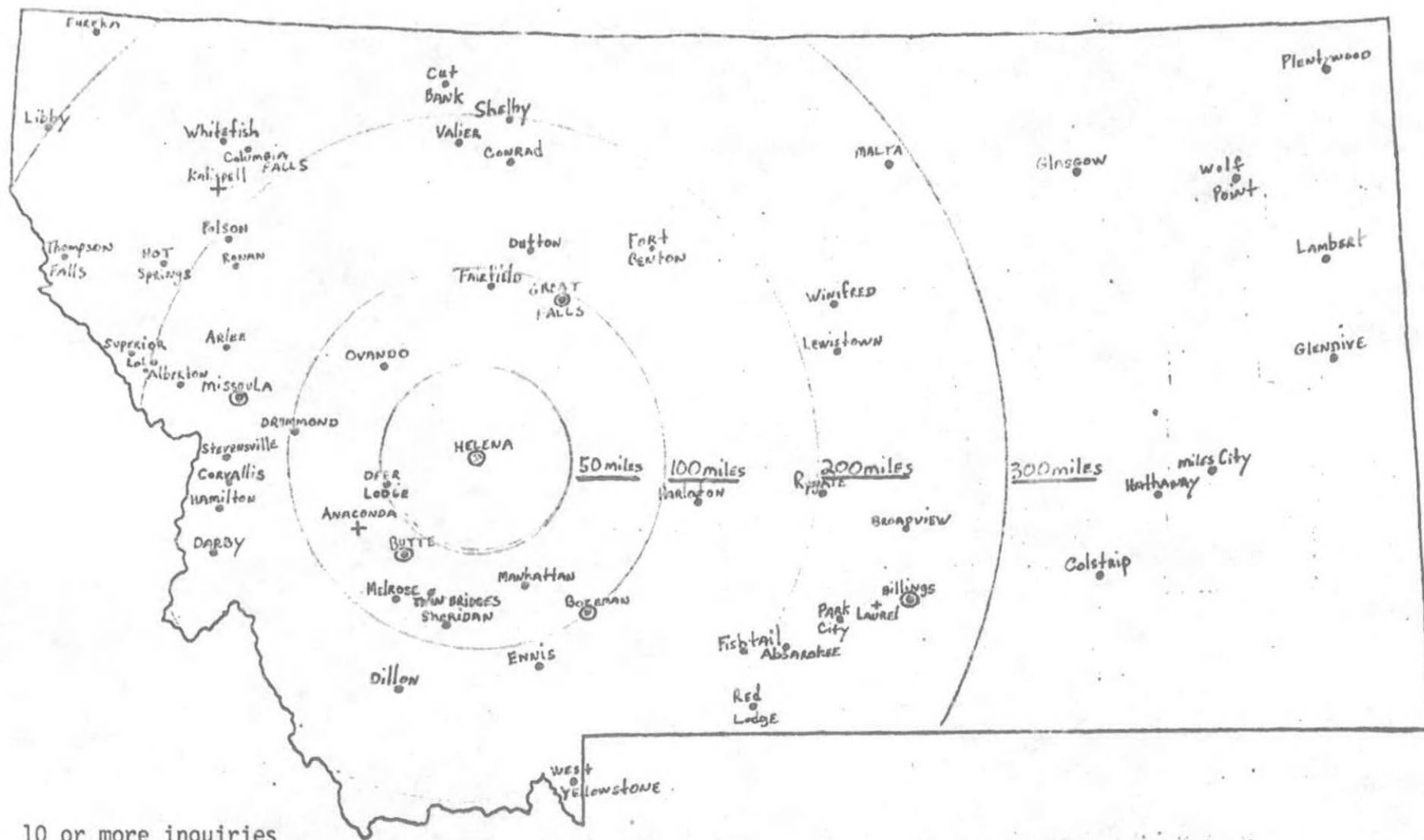


Figure 2. Geographic Distribution of Inquiries by Locality
January 1, 1976 to January 31, 1976

are not within the Citizens' Advocate Office's jurisdiction have included two requests for information during January, 1976, concerning federal tax rebates and one complaint against the inefficiency of the Army's insurance practices.

According to Ms. McGowan, most inquiries or grievances are registered by individuals. A check of the inquiries received by the office in July, 1975, showed that 51.6 percent of the complaints were male, 47.5 percent were female, and .9 percent were registered by two highschool groups, one oil company and a law firm. The January, 1976, figures were similar, with 58.1 percent male, 41.8 percent female and .1 percent received from commercial establishments. No information was available on the age, race, or income of those utilizing the office's services.

The areas most often mentioned in citizen inquiries or complaints are: consumer affairs, unemployment insurance, labor standards, workman's compensation, taxation, welfare, insurance, motor vehicles, landlord/tenant relationships and natural resources.⁸ Again, a statistical breakdown of the office's activities in the months of July, 1975 and January, 1976, illustrates the general veracity of this claim (see Figure 3). According to Kathy McGowan, the large number of miscellaneous inquiries in July can be attributed to the tourist season, i.e., many Montanans inquire about the location

<u>Month of July, 1975</u>			<u>Month of January, 1976</u>	
<u>subject matter</u>	<u>total number of complaints</u>	<u>percent of total</u>	<u>total number of complaints</u>	<u>percent of total</u>
unemployment comp.	38	8	33	6
insurance	11	2.4	38	6.8
motor vehicles	22	4.8	45	8.1
workman's comp.	22	4.8	15	2.7
labor practices	34	7.3	33	6
taxation	38	8	122	21.8
utilities	22	4.8	43	7.7
consumer problems	50	10.5	71	12.7
welfare	50	10.5	15	2.7
landlord/tenant	11	2.4	10	1.8
miscellaneous	161	33.9	128	23
other	11	2.4	3	.7
Totals	477	100	560	100

Figure 3. Most often Mentioned Complaint Areas
During July of 1975 and January of 1976.

and status of tourist facilities. The large percentage of income tax questions can be attributed to the on-coming tax season. When asked about the number of actual grievances against state administrative officials and procedures, Ms. McGowan stated that "only about 25 percent of the inquiries are actual complaints against state government. The rest are inquiries or requests for information that the Citizens' Advocate Office either supplies or refers to a more appropriate agency." Of the 25 percent of the grievances against state government, Ms. McGowan estimated that over 95 percent are resolved to the satisfaction of all those involved. An exact figure could not be given because the office is not able to follow-up on all of the complaints received.

Political association with the executive branch has not been a major factor in the functioning of the Citizens' Advocate Office. Ms. McGowan has attempted to remain completely independent of the Governor's office and she believes that she has accomplished this goal. There is still the question of the selection of the citizens' advocate and whether party affiliation plays any role in the process. The fact that the first Citizens' Advocate Kent Klienkopf, had been a long-standing member of the Democratic Party and a major fundraiser for Governor Judge in his 1972 bid for Governor would strongly suggest that political affiliation is an important consideration.

When asked about her feelings on this subject, Ms. McGowan admitted that when Kleinkopf was appointed party politics may have played a role. She felt, though, that her selection was predicated on the fact that she had been Kleinkopf's assistant and therefore was aware of the intricacies of running the office. She also said that no one from the Governor's office or any other branch of state government ever questioned her about her party designation.

Opinions of Administrative and Political Officials

The role and, in many cases, the contribution of the Citizens' Advocate Office has depended primarily on the cooperation and coordination of key political and administrative officials. Ms. McGowan has indicated that her office has developed an excellent working relationship with state government officials; however, a more in-depth analysis may be in order to assess the validity of this claim. Administrators employed in the areas most often mentioned by citizens in their complaints, such as Fred Barrett, Employment Security Division; Jake Wines, Consumer Affairs; Dick Cane, Labor Standards Division; Jack Carlson, Welfare Division; Mary Noel, Public Service Commission, and Keith Colbo from the Governor's office were contacted.⁹ All of the administrative officials felt that the Citizens' Advocate Office was an asset to state government because the office provides a centralized complaint-handling and information service. None of

the officials felt that the office duplicated existing appeal machinery. Every administrator agreed with Ms. McGowan's description of the relationship that her office has developed with administrative officials in state government and are willing to continue aiding the Citizens' Advocate Office in the resolution of complaints. When asked whether the office should be expanded or given additional power, such as the ability to subpoena administrative officials or the power to prosecute uncooperative bureaucrats, five of the six administrators stated that no changes were necessary and that the office should continue on its present course.

The opinions of political officials varied considerably. Senator Pat Regan (D) from Billings continually has utilized the office's services. She also commented that she advises her constituents to take advantage of the Citizens' Advocate Office whenever possible. Although Mrs. Regan had initially favored a bill (1975) that would have created a legislative ombudsman office, she does not feel the same way now. According to Mrs. Regan, Cathy McGowan's operation of the office has been "as apolitical as possible given the institutional association with the executive branch and the office is doing a fine job."¹⁰

Senator Frank Hazelbaker (R) from Dillon and Representative Ralph Eudaly² (R) from Missoula had mixed feeling about the Citizens'

Advocate Office. Neither legislator has ever personally utilized the office's services; however, both have referred constituents to the office.¹¹

Both Eudily² and Hazelbaker also felt that the office could function more effectively in the legislative rather than executive branch. According to Mr. Eudily³, the office should be under the control of the legislative council because "less politics are played there and the office would be given more independence."¹² However, he was unable to cite examples where politics entered into the operations of the Citizens' Advocate Office.

Conclusion

Widespread utilization of the Citizens' Advocate Office's services has enabled it to become an important vehicle for the transmission and resolution of citizens' grievances against state government. The installation of the toll-free capability (which has been done in neither Hawaii nor Buffalo) and, just recently, a device that allows the deaf to contact the office, has, and will continue to be the dominant means for citizens to make their demands or questions known and one of the most important reasons for the office's apparent success. Since less than 5 percent of the office's inquiries are rejected on jurisdictional grounds, it is able to play a much larger role in the overall operation of state government. In fact, the office has been

so successful that efforts were made in the 1973 (HB 597 sponsored by Baucus, Ulmer, Kimble and Regan) and 1975 (HB 411 sponsored by Vincent, Kimble, et al) legislative sessions to transform the Citizens' Advocate Office into a legislative ombudsman. Both bills failed to receive the necessary votes for passage.

In terms of accessibility, the Montana Citizens' Advocate Office, because of the toll-free telephone capability, has surpassed the experience of both Buffalo and Hawaii. The approximately 55,000 inquiries per year compared to 1,300 in Hawaii and 864 in Buffalo, where the offices operate on an "eight-to-five" basis without toll-free service, illustrates the extent to which citizens of Montana utilize the office and the significance of the toll-free number. The broad mandate characteristic of an executive ombudsman and of the Montana Citizens' Advocate Office also enhances its ability to field and investigate inquiries. Both the Hawaiian and the Buffalo ombudsman offices, however, were plagued by jurisdictional problems that caused them to reject over half of all complaints received.

The question of political affiliation, so often mentioned as a deficiency of the executive ombudsman, does not appear to play any more of a role in the Citizen's Advocate Office's operations than in the Buffalo or Hawaiian ombudsman offices. In fact, the institutional and political attachment to the executive branch has had more

of a positive effect on the functioning of the Citizens' Advocate Office than a negative one. Although most administrators feel that the office's success thus far is related to its institutional association with the Governor's office, they do not feel that it undermines the office's credibility as a complaint-handling agency.

The relative ease with which the executive ombudsman office can be created and made operational at any level of government in the American political system is one of its most desirable characteristics. Because the office is essentially an extension of the executive branch and since administrative officials are accustomed to executive oversight or executive involvement in administrative matters, the circumstances that form the basis for the activities of the executive ombudsman differ from those of a legislative ombudsman. Specifically, the existence of an executive ombudsman office within local, state or the federal government does not constitute a threat to the separation of powers doctrine nor would it undermine or replace the casework function of the legislative as well as judicial branches of government.

In the short run, the executive ombudsman office can be a highly effective complaint-handling and information center. It can provide a valuable service to citizens at any level of government and, through the issuance of quarterly and annual reports, allow the executive to remain constantly aware of citizens' demands on government.

In the long run, though, the executive ombudsman does not have the expertise or the capability to initiate preventative programs to halt recurring administrative blunders. In cases where the administrative process is malfunctioning, the legislative ombudsman exists to make recommendations and initiate procedures designed to eliminate inefficient administrative practices. It

is speedier and more efficient to turn to the [executive ombudsman] for authoritative action when a government service -- such as removing dead animals or providing police protection -- is not forthcoming. The more complicated cases undertaken by a classical Ombudsman are not usually as urgent nor as amenable to precipitous intervention.¹³

Both grievance-handling mechanisms share many fine qualities, and in some cases, the adoption of the executive ombudsman may be a step toward the later implementation of the legislative ombudsman.

Essentially,

the executive Ombudsman office should not be viewed as a perversion or distortion of the Ombudsman idea, but rather as a variation of it, and possible combination with it, presenting slightly different congeries of advantages and weaknesses. Either the executive or classical versions alone, and both together, are effective devices to redress individual grievances and to improve the quality of administration.¹⁴

Footnotes

1. Unless otherwise indicated, the information in this section was obtained from an interview with Ms. Kathy McGowan, the present Citizens' Advocate for the State of Montana.
2. Stanley V. Anderson, "Comparing Classical and Executive Ombudsman", in Executive Ombudsman in the U.S., Alan J. Wyner (ed.) (Institute of Governmental Studies, University of California, Berkeley), 1973, p. 307.
3. Roger C. Crampton, "A Federal Ombudsman," Duke Law Journal I (April, 1972), pp. 1-14.
4. Op Cit., p. 310.
5. Ibid., p. 314.
6. Ibid., p. 309.
7. Ibid., p. 308.
8. Information obtained from Kathy McGowan and from a survey of the office's inquiries during July of 1975 and January, 1976.
9. Information obtained from telephone interviews July 22, 1977.
10. Telephone interview with Pat Regan, July 22, 1977.
11. Telephone interview with Frank Hazelbaker and Ralph Eudily, July 22, 1977.
12. Telephone interview with Ralph Eudily, July 22, 1977.
13. Ibid., p. 314.
14. Ibid., 314.

SUMMARY

Widespread adoption of the classical model of the ombudsman institution in the United States does not appear likely in the near future. However, the availability of federal funds may stimulate experimental projects that will help fill in the existing information gaps. These projects must address the "hidden costs" of the classical ombudsman institution, i.e., whether the office increases the timidity of civil servants, causes unnecessary red tape, undermines the separation of powers doctrine or will be consistently hampered by our federal system of government. Perhaps the most important obstacle that must be overcome is convincing government officials, particularly legislators, that the office will make a valuable contribution to existing operations and will not undermine or replace the casework function of legislative officials.

Since there is general agreement among government officials that there is a need for a more informal and less costly approach toward grievance-handling, the basis for the introduction of an ombudsman office does exist. Although endowed with these characteristics, the present drawbacks and problems associated with the classical ombudsman institution have combined to severely hinder

the possibility of its adoption. To sidestep these obstacles and still satisfy the desire for a less structured complaint-handling office, executive ombudsman offices have been created in many state and local governments across the country. The Montana Citizens' Advocate Office, as an example of an executive ombudsman institution, illustrates the similarities between the two models and some of the advantages associated with an executive ombudsman office. Despite the similarities in structure, mandate and methods of operation between the two models, the major differences, i.e., the source of authority and the level of independence have been the basis for the general acceptance and success of the executive ombudsman office and the primary reasons why the older Scandinavian model has not been widely adopted. The executive ombudsman office, as an arm of the executive branch, represents a more traditional or institutional approach toward handling citizen input. The classical model, which requires a totally independent investigator empowered to cross all political and administrative boundaries with the exception of the courts, represents a radical departure from existing methods of operation and our political culture. Over the years, constitutionally mandated limits of the executive, legislative and judicial branches of government have caused political and administrative officials to become openly protective and even suspicious of efforts to impinge on or restrict their methods of operation or scope of authority. Since an ombudsman

under the classical model represents a direct threat to this power structure, very little support for its adoption can be expected. It is one thing to have an executive appointee investigating complaints of maladministration and quite another to have a highly sophisticated, independent, statutorily protected ombudsman with the power to disregard political boundaries. Because of this, the executive ombudsman appears to be far more appealing to most political, administrative and legal factions.

Continued criticism and concern about the effectiveness of existing appeal machinery and grievance-handling procedures may result in the growth of a more conducive environment in which the classical ombudsman office can be introduced and adopted. Until then, emphasis will probably remain on complaint-handling offices that can be easily created, inexpensively operated and easily dissolved, i.e., the executive ombudsman. This emphasis, though, exists not because the executive ombudsman has more to offer than his classical counterpart. Because the legislative ombudsman, in theory and in practice, is a highly sophisticated, well-respected, professional grievance handler, while the executive ombudsman normally lacks professional administrative expertise and the office is more a part of the bureaucracy than a "watchdog" over it. When stripped of all the normative rhetoric, an analysis of the reasons why the executive ombudsman office is gaining in popularity while the classical model appears to be losing support, must focus on the fact that

1. the executive ombudsman is not there to change or re-organize existing administrative procedures and machinery. Information processing and dissemination is the executive ombudsman's primary responsibility -- not the resolution of citizens' grievances;
2. the legislative ombudsman is an active, external agent empowered to investigate and make recommendations to alter operations in any government office or agency. The classical model is characterized by a much more positive approach toward citizens' inquiries and emphasis is placed on the resolution of citizens' grievances.

Recent evidence has indicated that when executive, legislative and administrative officials in this country attempt to weigh the merits of both models against their respective ramifications, the decision to opt for the services of an executive ombudsman is by no means a mystery. After all, why create an office with the authority to meddle in all of state government's operations when a relatively powerless mechanism such as an executive ombudsman can be created and most, if not all of the positive features of the classical ombudsman institution can still be realized.

Essentially this paper has dealt with the distinction between the classical ombudsman institution and the Montana Citizens' Advocate Office. The basis for this distinction lies in the source of authority that is ultimately responsible for the office's creation and operation. It is precisely the source of authority that prevents the Montana Citizens' Advocate Office from effecting far reaching changes in the administrative system and relegates it to the position of an information processing and dissemination service rather than an active complaint-handling agency.

Because we can draw these categories as conceptually distinct, we need not assume that processing information and handling complaints are distinct in practice. For instance, an inquiry into the status of a delayed social security payment is categorized as a "complaint" and, through information processing, i.e., a telephone call to an appropriate agency, the "complaint" is solved. In actuality though, this may only illustrate the limited ability and capacity inherent in the Citizens' Advocate Office. Namely, it intervenes to ensure that the present machinery is functioning properly rather than probing into areas where the administrative machinery is producing less than satisfactory results. Such probing may well be the most significant function of the classical ombudsman and the major distinction between the Montana Citizens' Advocate Office and an ombudsman office patterned after the Scandinavian model. As a result of this distinction, the Citizens' Advocate Office, although it shares many of the characteristics and potentials of the classical model, but at the same time lacks the essential ingredients of an ombudsman institution, cannot, according to foreign standards, be classified as an "ombudsman" office.

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